



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2004

Ms. Marisa P. Elmore
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2004-6772

Dear Ms. Elmore:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 206943.

The Dallas County District Attorney's Office (the "district attorney") received a request for all records the district attorney maintains relating to the death of a named individual while in the custody of two named police officers, including all information related to the two named officers, and a list of adult witnesses identified during the investigation. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.119 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.¹

Initially, we note that a portion of the submitted information may constitute grand jury records that are not subject to the Act. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988).

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent the information is in the custody of the district attorney as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. However, to the extent that this information is not in the custody of the district attorney as agent of the grand jury, we will address your claims for this and the remaining submitted information.

Next, we note that you acknowledge that the requestor is entitled to basic information from the custodial death report that is included in the submitted information. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the attorney general, section one of a custodial death report filed with this office is public information, but sections two through five of the report are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Accordingly, the district attorney must release section one of the custodial death report to the requestor. However, because sections two through five of the report are deemed confidential under article 49.18(b), the district attorney must not release the remaining portions of this report to the requestor.

You assert that some of the submitted information is confidential under the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002 (a), (b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code

§§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). The medical records of a deceased patient may only be released upon the signed consent of the personal representative of the deceased. Occ. Code § 159.005(a)(5).

Medical records must be released upon signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that a portion of the submitted information is subject to the MPA and, therefore, may be released only in accordance therewith. We have marked the information that is subject to the MPA.

We note, however, that the MPA defines a patient as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a “patient” under section 159.001 of the MPA. Thus, section 159.002 protects only the medical records of people who were alive at the time the records were created. In this instance, some of the records at issue relate to a deceased individual and were created after the individual’s death. Thus, because records created after an individual’s death do not constitute “record[s] of the identity, diagnosis, evaluation, or treatment of a patient by a physician,” these records are not subject to the MPA and may not be withheld on that basis.

You also assert that some of the submitted information is confidential under section 773.091 of the Health and Safety Code, which is applicable to Emergency Medical Service (“EMS”) patient records. Section 773.091 provides in relevant part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b) This confidentiality “does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence

of a patient who is receiving emergency medical services.” Health & Safety Code § 773.091(g). Section 773.093(c) also requires that any subsequent release of the EMS records be consistent with the purposes for which the governmental body obtained the records. Thus, with the exception of the information described in section 773.091(g) which is not confidential, we conclude that the district attorney may only release the marked EMS records as outlined in section 773.093 of the Health and Safety Code.

The remaining submitted information consists of a completed investigation made of, for, or by the district attorney. Section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. Although you claim that this information is excepted from disclosure under section 552.111 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that does not constitute “other law” for purposes of section 552.022.² However, the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). The Texas Rules of Civil Procedure, however, only apply to “actions of a civil nature.” TEX. R. CIV. P. 2. Accordingly, rule 192.5 does not apply to the criminal matter at issue here. You also assert section 552.108 of the Government Code. Because information subject to section 552.022(a)(1) may be withheld as provided by section 552.108, we will address this assertion.

Section 552.108 of the Government Code states in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See, e.g., Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111).* Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(4), (b)(3), (c). When a request essentially seeks the entire prosecution file, the information is excepted from disclosure in its entirety pursuant to section 552.108 and the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because decision of what to include in file necessarily reveals prosecutor's mental impressions or legal reasoning). In this instance, we agree that the request encompasses the district attorney's entire case file. *Curry* thus provides that the release of the information would reveal the district attorney's mental impressions or legal reasoning. Accordingly, the district attorney may withhold most of the remaining submitted information pursuant to subsections 552.108(a)(4)(B) and (b)(3)(B) of the Government Code.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*. See Open Records Decision No. 127 at 4 (1976). This information must be released, whether or not the information is found on the front page of an offense report.

In summary, to the extent that the submitted information is in the custody of the district attorney as an agent of the grand jury, it is not subject to disclosure under chapter 552. The district attorney may only release the marked medical records in accordance with the MPA. The district attorney may only release the marked EMS records as outlined in section 773.093 of the Health and Safety Code. The district attorney may withhold the remaining submitted information pursuant to section 552.108 of the Government Code, with the exception of basic information, which must be released. As we are able to make these determinations, we do not address your remaining arguments under sections 552.101, 552.119 or 552.130 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/seg

Ref: ID# 206943

Enc. Submitted documents

c: Mr. James O. Skinner
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(w/o enclosures)